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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 887

THOMAS DiDONATO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Thomas Di Donato respectfully shows to this Honorable Court the following:

The Determination in the Court Below

Petitioner Thomas Di Donato was convicted on December 19th, 1961 in the Southern District of New York of one count of possession of counterfeit bills pursuant to a violation of Title 18, United States Code, Section 472. The Court sentenced the petitioner Di Donato on December 20th, 1961 to the custody of the United States Attorney General for confinement to a federal penitentiary for a period of five (5) years. On December 27th, 1961 the de-

fendant was admitted to bail in the sum of $12,500.00 pending appeal to the United States Court of Appeals for the Second Circuit.

On March 21st, 1962 the United States Court of Appeals for the Second Judicial Circuit in an opinion by Judge Kaufman of said Court entitled *United States of America* v. *Thomas Di Donato*, No. 291—September Term, 1961, affirmed the judgment of the lower Court and a copy of said opinion is attached herein and made a part hereof.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Rules of the Supreme Court of the United States and Title 28, United States Code, Section 1254(1) on the ground that the United States Court of Appeals for the Second Judicial Circuit has decided federal questions of substance which ought to be clarified and made more definite and certain and has decided questions of substance contrary to the applicable decisions of this Court, contrary to the spirit, form and substance of the entire Anglo-Saxon theory of jurisprudence and affirming that a two-day only trial by jury in our nation need only be by form, not substance.

The Facts

Thomas Di Donato, the defendant, entered the Coral Lounge on 52nd and 8th Avenue, New York City, at or about 8:30 P. M. on the night of December 15th, 1961. After ten minutes he was accosted at the bar by two unknown detectives of the New York City police force although no crime was committed in their presence and taken onto the street at the southeast corner of 52nd Street, frisked and searched. Detective Martino asserts he joined the two unknown detectives allegedly attached to the 18th Precinct of the City of New York and aided in the search.

Neither the two detectives nor Detective Martino had a warrant of arrest or search warrant for the defendant (nor intention of arresting Di Donato) prior to going into the bar. A wallet and personal belongings along with a roll of bills were seized from Di Donato. The defendant was then taken to the 18th Precinct and there the bills were examined by Detective Martino and then declared to be counterfeit. Approximately 4 hours later agent Deckard of the Secret Service arrived at the 48th Precinct and had the defendant control each and every bill and took the 82 ($20) counterfeit bills with him as a record although he had no warrant to search or arrest or complaint filed. The defendant was assigned in the Bronx for conspiracy to alter false money order, a misdemeanor under the laws of the State of New York. He was arraigned at the Federal Court some 8 days later and voluntarily appeared before the Grand Jury in said case.

The defendant Di Donato took the stand in his own defense and testified that he did not have knowledge that the bills were counterfeit and had in fact arranged with one Johnny, last name unknown, to exchange four diamond rings at a restaurant on Broadway, The Rialto, on December 15, 1961 for a wad of bills amounting to $1,800.00. Di Donato testified he did not count the bills after he received them nor did he have them in his possession for more than one-half hour before they were seized by the detectives. The wife of Di Donato corroborated his story when she testified that she had given him the four diamond rings on that afternoon at her home and the rings were given to her husband by her deceased mother-in-law. There was no written statement introduced by the prosecution alleging admissions by Di Donato although agent Deckard testified that Di Donato had told him that Johnny asked him if he was interested in buying some counterfeit money, that he had fifteen or sixteen hundred in $20 notes; that he would sell them for $400.00. That Di Donato had only $300.00 on his person and Johnny took the $300.00

and gave the $1,800.00 counterfeit bills to Di Donato. Di Donato said that he would either sell them in bulk or pass them individually at a profit.

Di Donato said he had made a deal with the detectives and agents and made admissions in order to protect a woman. Detective Martino reluctantly agreed that a woman Rose Bloom had been picked up for questioning and was at the 48th Precinct at the time Di Donato arrived from the 18th Precinct on December 15, 1961. Rose Bloom was released at said police station that night.

The defense counsel moved at the end of the Government's case to dismiss and to suppress the evidence and both motions were denied (111). At the conclusion of the defense, counsel for Di Donato moved to dismiss and to suppress both motions and denied with the Court reserving its right to pass after the motion to suppress after the jury's verdict was rendered (185).

The Questions Presented for Review

1. Can a Federal District Court Judge in his charge to the jury and contrary to the specific exception taken by defense counsel fail to instruct the jury at least once that the jury must acquit the defendant if it finds (a) that from the evidence it believes the defendant to be innocent (b) if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable doubt?

2. Was a Federal Court Judge's charge to the jury by only a skimpy reference to presumption of innocence, burden of proof and reasonable doubt the substantial cause for the compulsion of a guilty verdict in view of the jurors' desire to give leniency prior to the rendition of said verdict? Or was the

charge with respect to the aforementioned legal principles so inadequate, unclear, weak and equivocal as to strip the defendant on trial of a just and proper verdict?

3. Was the Trial Court in error when it denied a motion to suppress based on illegal search and seizure where the record was preserved throughout the trial although as in *Di Re* v. *U. S.*, 332 U. S. 581, no motion was made prior to trial for same and where as here the illegal search and seizure was not contested on the merits by the Government Prosecutor but by invoking Rule 41(e)? Is search and seizure now a substantive right and defense and has the *Mapp* v. *Ohio* case at 367 U. S. 645 and the *Di Re* case so welded this inherent right as to protect the defendant under circumstances where the record was preserved at trial and the prosecutor failed to show probable cause for the arrest when the burden of proof is upon the prosecutor to show the legality of the arrest?

Applicable Constitutional Statutory Provisions

(a) *The Bill of Rights of the United States Constitution, Article IV.*

"The right of the People to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated and no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

(b) *The Bill of Rights of the United States Constitution, Article V.*

"No person shall be held to answer for a capital or otherwise infamous crime unless * * * nor shall be

compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law."

(c) *Constitution of the United States, Section 1, Fourteenth Amendment.*

"* * * nor shall any person be deprived of life, liberty or property without due process of law."

Statute and Rules Involved

Title 18, Section 472, United States Code.

§ *472. Uttering Counterfeit obligations or securities.*

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than 15 years, or both. (June 25, 1948, ch. 645, 62 Stat. 705.)

Rule 30, Federal Rules of Criminal Procedure.

Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury afer the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury

retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 41(e), Federal Rules of Criminal Procedure.

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

POINT ONE

The Court's charge to the jury must contain at least one reference setting forth that the jury must acquit the defendant if it finds (a) that from the evidence it believes the defendant to be innocent, (b) if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable doubt; failing to so charge constitutes reversible error.

In no part of the charge (in the case at bar) was there a single utterance by the court that the jury must return a verdict of not guilty if it believes from the evidence that the defendant is innocent or that the Government failed to prove the elements of the crime beyond a reasonable doubt. The Court stated in *Williams* v. *U. S.*, 131 F. 2d 21, that "In no part of the charge was the jury even told that it could return a verdict of not guilty. That is error. But more than a mere statement that defendant can be acquitted is necessary. The jury must be told at least once in some unequivocal language that if it believes from the evidence that defendant is innocent or if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable doubt it must return a verdict of not guilty." (See also *McKenzie* v. *United States*, 126 F. 2d 533; *United States* v. *Searcey*, 26 F. 435.) This was not done in the case at bar.

Counsel for the defendant took exception to the charge of reasonable doubt (190), and insisted that the Court charge that it was the duty of the jury to acquit the defendant if there is reasonable doubt in the minds of the jury or if the jurors had a doubt based upon reason. The Court refused to so charge.

It is appropriate to observe in the charge that there was no definition of what reasonable doubt is nor was there an explanation of what reasonable doubt is.

The Court stated in *Madsen* v. *U. S.*, 165 F. 2d 507, 510 (1947), that "This rule, Rule 30 of the Federal Rules of Criminal Procedure does not however deprive a Court of its inherent power on its own volition to inquire into the adequacies of a charge to a jury in a criminal case where the life or liberty of a defendant is invoked."

In *U. S.* v. *Raub*, 177 F. 2d 312, 315, the Court stated, "It appears to be generally established now that Rule 30 (B) Federal Rules of Criminal Procedure notwithstanding in criminal cases involving life or liberty of a defendant an Appellate Court may notice plain and seriously prejudicial error in the instructions even though it was not called to the attention of the Trial Court."

It is axiomatic that if the jury entertain a reasonable doubt as to the guilt or innocence of a defendant, they must acquit the defendant.

In the case at bar the charge as a whole gives the impression of a tacit assumption that some kind of a verdict of guilty should be received.

Further, the exception as to reasonable doubt taken by counsel in the robing room and the request that said exception to reasonable doubt be taken in the presence of the jury (190) constitutes in and of itself a denial to a fair trial. In *Butler* v. *U. S.*, 188 F. 2d 24, at page 26 the Court stated: "We hold that the action of the trial Court in denying appellant the opportunity fully to state the basis of his objections to the Court's charge before the jury left the room, is not the sort of error the correction of which is contemplated by the rules. On the contrary it constitutes error affecting a defendant's substantial right to a fair trial and requires remanding the case for a new trial."

The Court in Its Charge Referred to Unanimous Verdict

In *Boyett* v. *U. S.*, 48 F. 2d 482, the Court enunciated as follows: "The reasonable doubt referred to in the Burden

of Proof rule is a reasonable doubt in the mind of any juror rather than a collective doubt shared in by all or a majority of the jury. If one juror has a reasonable doubt he cannot vote for a conviction with the result that in requiring unanimous verdicts there can be no conviction so long as one juror has a reasonable doubt of the guilt of the defendant.

The Court in the *Boatright* v. *U. S.*, 105 F. 2d 737 case in discussing reasonable doubt stated, "On the question of reasonable doubt the Court among other things said: 'If after all is said and done there should arise in this case a reasonable doubt as to the guilt of the defendants or either of them, it would be your duty to give them or him the benefit of such a doubt and acquit him or them as the doubt might justify or warrant you in so doing.' Just what is meant by the limitation 'as the doubt might justify or warrant you in doing' is not clear and we think the defendants were entitled to an instruction on reasonable doubt without such limitation." The Court reversed and remanded the cause for a new trial.

In the case at bar there was no instruction to the jury that their duty was to acquit if there was reasonable doubt nor was there any limitation on the instruction. There was no instruction on reasonable doubt with respect to the duty of acquitting the defendant if same was found by a juror or jurors. See *Yoder* v. *U. S.*, 80 F. 2d 665.

The Trial Court must instruct jury to return verdict for accused, unless there is substantial evidence of facts excluding every other hypothesis but that of his guilt of crime charged. *U. S.* v. *Maghinany*, 11 F. Supp. 760.

The case cited by the prosecutor in his brief, *United States* v. *Pape*, 144 F. 2d 778, at page 781, sustains the defendant-appellant's Point One in that at page 781:

> "The Judge has an overall duty to decide whether the case is strong enough under the applicable rules

> of law to go to the jury at all and then he *must admonish* the jury of its duty to *free the accused* if upon all the evidence it is not convinced of guilt beyond a reasonable doubt. . . ."

In the case at bar, there was no admonition, not even an instruction. The record is barren of any such direction.

The prosecutor's second case likewise supports the defendant-appellant's contention to wit:

United States v. *Feinberg*, 140 F. 2d 592, 594:

> ". . . and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt. . . ."

In the case at bar the jury sought instructions as to whether they could recommend leniency indicative of either feelings or doubts as to what to do and, further, there was no charge or direction by the Court that they must exclude all reasonable doubts to find him guilty. This charge of exclusion of all reasonable doubt before a jury could find a defendant guilty is strong, unequivocal and clear. This is not the case at bar and there can be no attempt to compare that with the legal mumble jumble of the case at bar on reasonable doubt. The once over "lightly" routine and press hard on the "guilty" and do not mention "not guilty".

The prosecutor's contention that the defendant appellant claims that the charge was fatally defective because the trial Court charged only that the jury could not convict if it had a reasonable doubt and did not charge in *haec verba* that it must acquit if it had a reasonable doubt. This is exactly what the petitioner's contention is not. The petitioner's contention is that in the trial of Di Donato the trial Court never charged that the jury could not convict if it had a reasonable doubt as well as it must acquit if it had a reasonable doubt.

The accused is entitled to "definition of the term" reasonable doubt and failure to so instruct upon request is error. *Wheatley* v. *U. S.*, 286 F. 2d 919; *Mundy* v. *U. S.*, 176 F. 2d 32, at page 33:

> "The Court has instructed you on reasonable doubt many, many times and of course, if you have a reasonable doubt as the Court has explained that term to you in this case you must resolve that doubt in favor of the defendant and acquit him."

In brief the jury was without a set of guiding principles and the trial was in form only not substance.

POINT TWO

The Federal Judge's eight (8) minute entire charge to the jury was so skimpy with respect to presumption of innocence, burden of proof and reasonable doubt as to be the substantial cause for the compulsion of a guilty verdict in view of the jurors' desire to give leniency prior to the rendition of said verdict and subjects this questionable verdict to microscopic scrutiny.

The Court's only reference in its charge to presumption of innocence, burden of proof and reasonable doubt is the following ten (10) sentences:

> ". . . and you know that under our system he [the defendant] is presumed to be innocent and that presumption stays with him until that moment in your deliberations when you decide that he is guilty beyond a reasonable doubt."

> ". . . I told you the defendant is presumed to be innocent. The fact that he has been accused by a grand jury does not destroy that presumption. The burden of proof, in the sense of the responsibility of persuading you ladies and gentlemen, rests upon the

government. The quantum or the measure of proof necessary before you lawfully can find the defendant guilty is referred to as proof beyond a reasonable doubt.

"Now, by a reasonable doubt I do not mean a positive certainty. Proof beyond a conceivable doubt cannot be reached in the world of actuality, and neither is a reasonable doubt a decision arbitrarily reached because a juror has a reluctance to perform an unpleasant task. Nor is it a disbelief that we have based upon the natural sympathy that we are supposed to have for one another.

"Reasonable doubt, most nearly signifies one which the average person of ordinary prudence and intelligence has after weighing all the evidence carefully."

This one minute dissertation of these three great and majestic safeguards in an eight minute charge is historic. The Circuit Court's opinion indicates that because the indictment contained one count and the facts are simple, that there was no prejudicial error in the aforestated immutable legal principles. If the trial is short, in the case at Bar—2 days, a jury unversed in law, confused by the mysteries and the unfathomables of the law must be given more instructions not less so that the real applications of these principles can be had with the facts at hand so that a thorough job can be performed in the discharge of their duties and the upholding of the law. I agree with Circuit Court's statement at page 1361 "For a Judge must 'be a light to Jurors to open their eyes . . .'"

In the case at Bar someone put out the lights and to quote a biblical saying "and there shall be darkness . . ."

The jury retired to deliberate at 12:48 p.m. on December 19, 1961. At about 3:00 p.m. it sent a note to the Trial Judge which read: "There is a question as to whether we can recommend leniency." The jury returned to the court-

room at 3:08 p.m., and the Court said:

> "Ladies and Gentlemen, I have a note from you which reads, 'There is a question as to whether we can recommend leniency.'
>
> I suppose by that you mean whether in returning your verdict you can recommend leniency. The answer is that if you arrive at a verdict of guilty you can recommend anything you want, but I must tell you in the same breath that it has no weight with me. If the man is guilty, on me alone, on my conscience, is the question of sentence, but that doesn't prevent you from recommending anything you want. But I want it perfectly understood that if your verdict is that the man is guilty what punishment he should get is my problem, not yours at all.
>
> So, would you please retire now."

The Court in three separate sentences used the word "guilty". There were four (4) sentences. The jury five (5) minutes later returned a verdict of guilty. Clearly the charge with its total inadequate charge on reasonable doubt as well as the further instruction to the jury compelled one verdict—guilty.

The jury in criminal cases must not reveal to Court or any person how jury stands numerically or otherwise on question of accused's guilt or innocence until after they have reached a unanimous verdict.

United States v. *Schneiderman*, 106 F. Supp. 906.

POINT THREE

The trial Court was in error when it denied a motion to suppress based on illegal search and seizure where the record was preserved throughout the trial as in *Di Re* v. *U. S.*, 332 U. S. 581 and where as here the illegal search and seizure was not contested on the merits by the prosecutor but by invoking Rule 41(e). Further the burden of proof in an arrest without a search warrant as to the search is on the prosecutor.

The Government concededly offered no probable cause for the arrest and the cross-examination at trial so demonstrated.

"Cross Examination by Mr. Hanrahan:

* * * * * *

(85) Q. Do I hear you correctly officer—detective, rather—when you say that you made the arrest of this defendant?

Mr. Daly: I don't think, your Honor, there's been any such testimony and I object.

The Court: He is right here, and you can ask him. Did you say you arrested this defendant?

A. I did arrest this defendant.

Q. Well, now, when DiDonato had been taken out of the bar, do you know if the detectives had a search warrant or warrant of arrest for DiDonato? A. No, sir.

Q. You talked to these two detectives, did you not, sir? A. Yes, sir.

Q. And did you ask them whether or not they had a warrant of arrest, a search warrant for DiDonato?

Mr. Daly: I object, your Honor. I don't see what the relevance is.

The Court: I will permit it. Did you ask them that question?

A. They went in at my direction. They had no search warrant.

Q. They went in at your direction, sir? (86) A. Yes, sir.

Q. Did they go in at your direction to arrest DiDonato? A. Excuse me?

Q. Did they go in at your direction to arrest DiDonato? A. Not to arrest them, no, sir.

Q. Did you have a search warrant for DiDonato? A. No, sir, I didn't.

Q. Of a warrant of arrest? A. No, sir, I didn't.

Q. At the time that you made the arrest of DiDonato, was that outside the bar or was it in the police station? A. Outside the bar.

Q. Did you then have a warrant of arrest or search warrant? A. No, sir, I didn't.

Q. Detective, did you examine DiDonato outside the bar?

The Court: You mean physically?

Q. Yes, physically. A. Did I search him do you mean?

Q. Yes, sir. A. No, sir, I didn't myself search him.

(87) Q. Who did that? A. The two detectives that brought him to the street.

Q. And where did this search take place? A. The side door of the lounge, just outside on the street.

Q. Well, now, did the detectives—which detective took money out of DiDonato's pocket? A. I don't know their names. He came out one on each side. The detective on his left when he was brought outside was standing on the street. When they got outside the bar they proceeded to search him, all his property was taken from them and kept in their hands and I was present when it was taken out.

Q. This was on the street? A. Yes, sir.

Q. And was the money counted on the street? A. No, sir, it was not.

Q. Well, now, these detectives had gone into the bar at your direction, isn't that right? A. Yes, sir.

Q. And you didn't know their names? A. No, sir, I don't."

Each case must be decided on its own facts and in the *Di Donato* case it must be conceded that the following facts were developed on cross examination:

(A) The two unknown detectives who entered the Coral Lounge Cafe had no search warrant or warrant of arrest.

(B) The two detectives did not go into the bar to arrest Di Donato.

(C) No crime was committed in the presence of the officer at the bar and no reason was offered for the arrest.

(D) The search preceded the arrest.

The discovery that the bills found on the person of Di Donato were counterfeit came after the arrest and in the police station and after a receipt for said bills were asked for by Di Donato.

The complaint filed by Agent Deckard of the Secret Service was on December 16, 1961—one day after the arrest of Thomas Di Donato by city detectives.

The record in the present case was preserved throughout the trial by motions and objections on the part of the defense during the presentation of the prosecutor's case as to the counterfeit bills in question. See *Gilbert* v. *U. S.*, 291 U. S. 587.

The prosecutor failed to show probable cause for the arrest without a warrant, a legal arrest and a reasonable search and seizure, for the defendant was searched without consent and by force and coercion. The Government failed to show why Di Donato had been arrested.

The burden of proof in an arrest without a search warrant is on the prosecutor and the prosecutor must prove by clear and convincing evidence that consent to search was free and voluntary. *U. S.* v. *De Vico*, D. C. N. Y., 190 F. Supp. 443; *Channel* v. *U. S.*, 285 F. 2d 237; *Contreras* v. *U. S.*, 291 F. 2d 196.

The prosecutor in a footnote in his brief tells the Court that the defendant-appellant was entrapped by an informant and that is the reason why Di Donato had appeared at the Lounge, had been implicated by an informant, had kept a rendezvous which the informant had disclosed as a set-up. As a matter of law the prosecutor has proved by this statement that the Government has entrapped the defendant-appellant and the defendant-appellant now moves for a dismissal of the indictment against the defendant. *Sorrels* v. *U. S.*, 287 U. S. 435; *Newman* v. *U. S.*, 299 F. 2d 128; *Butts* v. *U. S.*, 273 F. 2d 35.

More significant is the fact that the defense attempted to subpoena the records as well as the two detectives who allegedly made the search and they could not be found at the 16th or 18th Precinct of the City of New York. Detective Martino did not know who the two detectives were and swore to same under oath.

It is obvious that the prosecutor could not have produced the two unknown detectives, then how could defense counsel have secured them for a motion to suppress. The throwing up of rule 41 E requiring a pre-trial motion to suppress is blatantly and viciously a smoke screen so as to hide behind a rule when a hearing which is the body and substance of the rule could not have in the first instance been had.

As codified the rule is not a rigid one for "the Court in its discretion may entertain the motion at the trial or hearing", *Wrightson* v. *U. S.*, 222 F. 2d 556.

> "The point here is that at the trial when the search and the arrest were under attack as illegal, the officer

> and the prosecutor chose not to reveal what cause there was for the arrest and thus not to support its legality. There is law which governs arrest, that law is binding upon police officers and persons arrested have a right to invoke it."

The *Wrightson* case develops the theme: "Why the arrest as in the case at bar. No proof is offered by the prosecutor and the case against the petitioner must fail and be sent back for a new trial."

> "We are here at the very heart of due process of law and more directly at the essence of the Fourth Amendment. Justification for a search without a warrant is here sought on the ground that it was incidental to an arrest without a warrant. When the arrest is held legal the incidental search becomes legal. When the arrest is stripped of necessity for probable cause the search is stripped of the same necessity."

In *Mapp* v. *Ohio*, 367 U. S. 645, the Court noted at page 645: "at the trial no search warrant was produced by the prosecution, nor was the failure to produce explained or accounted for . . ." (p. 662). The close interrelationship between the Fourth and Fifth Amendment as they apply to this problem has long been recognized and indeed has expressly made the ground for the Court's holding in *Boyd* v. *U. S.*, 116 U. S. 616.

The prosecution failed in the case at bar to show probable cause for the arrest. There was no crime committed in the presence of the detective, nor any proof that a felony had been committed. A search, which is unreasonable for want of probable cause, cannot be made reasonable by what the search uncovers. In law it is good or bad when it starts and does not change character from its success. It is not made reasonable by what it brings to light (*Byars* v. *U. S.*, 273 U. S. 28; *Johnson* v. *U. S.*, 333 U. S. 110; *McDonald* v. *U. S.*, 335 U. S. 451; *People* v. *De Vasto*, 198 App. Div. 629.

The requirement of probable cause for arrest without a warrant is surely no less exacting than is the necessity for probable cause to obtain a warrant of arrest. The quantity and quality of proof is the same. Otherwise no officer need ever apply for an arrest warrant.

In *Hanna* v. *U. S.*, (1958), 260 F. 2d 723, the Court held that evidence obtained by an unreasonable search and seizure conducted by State officers without any involvement of Federal officers cannot be introduced in evidence in the Federal Court.

In *Lustig* v. *U. S.*, 338 U. S. 76, the Court in noting that Federal agents did not participate in seizing the contraband but arrived later and the counterfeit bills were turned over to them stated: "'To differentiate between participation from the beginning of an illegal search and joining it before it had run its course would be to draw too fine a line in the application of the 4th Amendment as interpolated. *Byars* v. *U. S.*, 273 U. S. 28. Vindicated anticipation of what an illegal search may reveal does not validate a search otherwise illegal."

In *Di Re* v. *U. S.*, 332 U. S. 581, the Court held that searches of both the person arrested and the place where the arrest is made derived their legality in the absence of a search warrant from the existence of a lawful arrest. Without probable cause to arrest subsequent searches, either of person or property, violate the 4th Amendment.

In *Miller* v. *U. S.*, 357 U. S. 301, the Court observed that the officer had no probable cause to arrest the petitioner without a warrant and that the search was not justified as being an incident of a lawful arrest and possession of marked money did not justify the arrest.

A *voir dire* was called on several occasions with respect to the counterfeit $20 bills; no proof was offered for probable cause by the Government and such an arrest based upon suspicion alone is unlawful and the product of the

incidental search is inadmissible (*Henry* v. *U. S.*, 361 U. S. 98). "The traditional round-up of persons with records of similar crimes for questioning or for investigation or upon an 'open charge' will not support an incidental search of the person or the premises where the arrest is made."

In the case at bar it is apparent that the search was primary and the arrest was used as a pretext to justify the search a) no proof offered as to the commission of any crime in the presence of the two detectives, b) the failure of Detective Martino to know who the two detectives were nor were they produced for a hearing to justify the arrest on the grounds of probable cause. In this instance then the test is "Was the arrest made for the purpose of conducting a search. If so the search is exploratory in its inception." Did the incidental search degenerate into a search upon "search to be—a fishing expedition for evidence?". If so the search has become exploratory. In the exploratory search there is an arrest often with probable cause, but the arrest is a pretext for the search—or, if the search was in its inception truly incidental, it in fact degenerated into an exploratory search so that the purpose to search transcended the purpose to arrest (*Gilbert* v. *U. S.*, 291 F. 2d 586; *Lee* v. *U. S.*, 232 F. 2d 354).

In *White* v. *U. S.*, 278 F. 2d 386, the defendant was arrested at 2 A.M., in the street by a Police Officer without a warrant. The arrest led to the discovery of stolen money orders—Held: an unreasonable and unlawful violation of defendant's rights as a citizen rendering stolen money orders inadmissible. The officer had no warrant of any kind and no probable cause to accost appellant requiring him to place his hands in a certain position and frisk him. *Greene* v. *U. S.*, 259 F. 2d 180.

There had been no outcry or report of a felony and the appellant committed no misdemeanor in the officer's presence nor was any reason given for the arrest.

There are New York decisions and others outstanding to support the view that accosting, frisking and assumption of dominion over appellant's person constitutes an arrest.

See:

People v. *Esposito*, 118 Misc. 867, 194 N.Y.S. 326;
1 Alexander, The Law of Arrest, 353, 358 (1949).

In short, the arrest cannot stand; thus the search incidental to it and without a warrant also fails.

CONCLUSION

The petition for certiorari should be granted on the grounds herein enumerated.

Respectfully submitted,

JAMES J. HANRAHAN,
Attorney for Petitioner.

APPENDIX

Opinion of United States Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 291—September Term, 1961.

(Argued March 6, 1962 Decided March 21, 1962.)

Docket No. 27349

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS DI DONATO,

Appellant.

Before:

LUMBARD, *Chief Judge,*
KAUFMAN and MARSHALL, *Circuit Judges.*

Appeal from a conviction for possession of counterfeit Federal Reserve Notes in violation of 18 U. S. C. § 472, after a trial before Thomas F. Murphy, *Judge*, and a jury, in the United States District Court for the Southern District of New York. Affirmed.

JAMES J. HANRAHAN, New York, N. Y., *for appellant.*

T. F. GILROY DALY, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Sheldon H. Elsen, Assistant United States Attorney, of counsel), *for appellee.*

KAUFMAN, *Circuit Judge*:

After a trial before Judge Murphy and a jury Thomas Di Donato was convicted on a single count indictment charging him with possession of 82 counterfeit $20 Federal Reserve Notes in violation of 18 U. S. C. § 472, and was sentenced to 5 years' imprisonment.

The government's evidence showed that on December 15, 1960, Di Donato met one "Johnny" in a Manhattan restaurant and purchased the counterfeit bills specified in the indictment. Di Donato then proceeded to a tavern at 8th Avenue and 52nd Street where he was approached by two New York City detectives. Although the detectives were unaware at that time of the counterfeit bill transaction they escorted Di Donato out of the tavern and searched him. Upon finding the bills the detectives took appellant to a station house in the Bronx. En route Di Donato not only admitted the transaction with Johnny, but also conceded that the bills were counterfeit. Appellant later repeated this admission to a Secret Service agent who had been notified of the arrest by the police.

Appellant attacks his conviction on three principal grounds. First, he asserts that the counterfeit bills should not have been admitted into evidence because they were obtained by an unlawful search and seizure in violation of his constitutional rights. Second, he contends that the trial court committed reversible error by refusing to instruct the jury that it must acquit if the government failed to prove his guilt, although the court already had charged that a verdict of guilty could be returned only if guilt was proven beyond a reasonable doubt. Third, he claims that the trial judge, in answering a question by the jury concerning the effect of a recommendation of leniency, suggested that the defendant was guilty.

Appendix.

The first government witness was Secret Service agent Wilmer K. Deckard who had been summoned by the arresting detectives. The agent identified the bills found on Di Donato and stated that they were counterfeit. The government then offered the bills into evidence. At his request, defense counsel was then granted a *voir dire* of the agent. At its conclusion counsel stated he had "no objection" to the receipt of the bills in evidence as Exhibit 1. On resumption of the agent's testimony counsel experienced a change of mind and objected with an oblique reference to an unlawful search and seizure. Assuming *arguendo* that appellant's constitutional claim was correct, we hold that he waived any right he may have had to suppress the evidence. Rule 41(e), Fed. R. Crim. P., provides that a motion to suppress evidence "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion"; however, the court has discretion to entertain the motion at trial. Here the bills were obtained from the person of the defendant when he was arrested a year before his trial,[1] and he was aware of all the circumstances related to the alleged improper procuring of evidence long before the case came to trial. At no time between the arrest and trial did he move to suppress the evidence. In fact, on October 9, 1961, the day set for the making of defense motions, appellant took no action at all. This was ten months after the search and seizure of the notes. We do not have a case in which there was any legal uncertainty that suppression would be available if appellant's factual assertions were correct. *Elkins* v. *U. S.*, 364 U. S. 206 (1960); nor was any reason or excuse offered at the trial for the failure to make the motion for suppression earlier. In

[1] The search and seizure took place December 15, 1960; trial commenced December 18, 1961.

U. S. v. *Romero*, 249 F. 2d 371, 374 (2nd Cir. 1957) we held, under similar circumstances, that the motion was addressed to the discretion of the court; and concluded that where the motion was made after trial commenced, and more than three months after seizure, its denial was not an abuse of that discretion. We have already noted that in the instant case the motion was made after trial commenced and a year after the seizure. We conclude that here, as in *Romero*, the judge did not abuse his discretion. *U. S.* v. *Sheba Bracelets*, 248 F. 2d 134, 139 (2nd Cir.), cert. denied 355 U. S. 904 (1957).

The court instructed the jury that the defendant was presumed innocent and that the government had the burden to prove he was not. Furthermore, the jury was told that "the quantum or the measure of proof" which was necessary before they could "lawfully * * * find the defendant guilty is referred to as proof beyond a reasonable doubt." This was defined, in part, as a doubt which "most nearly signifies one which the average person of ordinary prudence and intelligence has after weighing all the evidence carefully." Appellant does not contend that these instructions were wrong; he insists that they were inadequate. Specifically, he says it was reversible error for the court to refuse to instruct the jurors as requested that if there was a reasonable doubt in their minds as to his guilt, "they have a right to, and they must by duty" acquit him.

It is difficult to perceive why the court refused to make explicit what was already implicit, namely, that if the government failed to prove the defendant's guilt beyond a reasonable doubt the jury must acquit. This is certainly the law, *U. S.* v. *Pape*, 144 F. 2d 778, 781 (2nd Cir.), cert. denied, 323 U. S. 752 (1944), and it is surely crucial to a fair trial that the essence of the requested charge be conveyed to the jury. Although a defendant cannot complain of the court's refusal to charge exactly as he requests,

Appendix.

U. S. v. *Verra*, No. 27336, 2nd Cir., March 9, 1962; *U. S.* v. *Arrow Packing Corp.*, 153 F. 2d 669, 671 (2nd Cir.), cert. denied, 327 U. S. 805 (1946), he may justifiably complain when the court refuses to charge the correct law, expressly, and thereby relies upon the jury's ability to infer it. If no objection is made there may be no error—if the inference is plain. However, when an objection is made, the trial judge ought to utilize the opportunity provided to correct oversight and to clarify the law for the jury. This is especially important in criminal cases in which the liberty of the defendant may depend upon every word the judge may say—or fail to say. For a judge must "be a light to jurors to open their eyes * * *."[2]

Nevertheless, in the present case we are unwilling to hold that the court's failure to give the requested charge was prejudicial error.[3] The indictment contained but one count; the facts were simple. Despite the omission the charge adequately explained the government's burden of proof. It would seem, therefore, that while the jury should

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[2] Bacon, *Speech 1617*, when Justice Hutton was called to the bench of Common Pleas.

[3] The Court, in discussing the government's burden stated:

"The defendant has pleaded not guilty. And you know that under our system he is presumed to be innocent. And that presumption stays with him until that moment in your deliberations when you decide that he is guilty beyond a reasonable doubt. * * *

"And now, a word about the burden of proof, and this is always important in a criminal case. I told you the defendant is presumed to be innocent. The fact that he has been accused by a grand jury does not destroy that presumption. The burden of proof, in the sense of the responsibility of persuading you ladies and gentlemen, rests upon the government. The quantum or the measure of proof necessary before you lawfully can find the defendant guilty is referred to as proof beyond a reasonable doubt.

(Footnote continued on following page)

have been apprised of its duty to acquit if the government failed to prove guilt, in the context of this case, the failure to give the instruction did not affect substantial rights and was harmless error. Rule 52(a), Fed. R. Crim. P.; *Pezznola* v. *U. S.*, 232 F. 2d 907, 915 (1st Cir.), cert. denied, 352 U. S. 834 (1956). Insofar as *McKenzie* v. *U. S.*, 126 F. 2d 533 (D. C. Cir. 1942) and *Williams* v. *U. S.*, 131 F. 2d 21 (D. C. Cir. 1942) suggest that the District of Columbia Circuit might reverse in a case where the constituent elements of the crime are complex, they are not apposite. If these decisions stand for an inflexible rule without regard to the simplicity of the case or the harmless error doctrine, we decline to follow them.

Two hours after the jury retired to deliberate the trial judge received a note from the jury stating: "There is a question as to whether we can recommend lenieney." The jury was brought back to the courtroom and the judge spoke to them as follows:

> "Ladies and Gentlemen, * * * I suppose by that [note] you mean whether in returning your verdict you can recommend lenieney. The answer is that *if* you arrive at a verdict of guilty you can recommend anything you want, but I must tell you in the same breath that it has

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(Footnote continued from preceding page)

> "Now, by a reasonable doubt I do not mean a positive certainty. Proof beyond a conceivable doubt cannot be reached in the world of actuality, and neither is a reasonable doubt a decision arbitrarily reached because a juror has a reluctance to perform an unpleasant task. Nor is it a disbelief that we have based upon the natural sympathy that we are supposed to have for one another.
>
> "Reasonable doubt most nearly signifies one which the average person of ordinary prudence and intelligence has after weighing all the evidence carefully."
>
> (Appellant's Appendix, pp. 7-a, 10-a—11-a.)

no weight with me. *If* the man is guilty, on me alone, on my conscience, is the question of sentence, but that doesn't prevent you from recommending anything you want. But I want it perfectly understood that *if* your verdict is that the man is guilty, what punishment he should get is my problem, not yours at all.

"So, would you please retire now." Tr. p. 224 (italics added).

Appellant claims that this instruction (in addition to his claim of an "inadequate" charge on reasonable doubt, a contention which we have found without merit) "compelled one verdict—guilty." Appellant's Brief, p. 7. We disagree. Indeed, the court's firm instruction that punishment was not to be considered by the jury and that any recommendation it may make had "no weight with me" was proper. This made it quite clear to any juror inclined to compromise that the verdict was not to be adulterated by considerations extraneous to the jurors' function.

Appellant's contention that he should have been allowed to object to the charge in the presence of the jury is so wholly without merit that it requires no comment. *U. S. v. Hall*, 200 F. 2d 957, 958 (2nd Cir. 1953); Rule 30, Fed. R. Crim. P.

Affirmed.

Judgment.

On this 20th day of December, 1961, came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly and with intent to defraud, keeping, possessing and concealing falsely made, forged and counterfeited twenty dollar Federal Reserve Notes. (Title 18, Section 472 U. S. Code:)

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court:

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

THOS. F. MURPHY,
United States District Judge.
HERBERT A. CHARLSON,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 887

THOMAS DI DONATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Gov. R., 132-138;[1] Pet. App. 23-29) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1962 (Gov. R., 132; Pet. App. 30). The petition for a writ of certiorari was filed on April 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Gov. R." refers to the government's appendix in the court of appeals as supplemented by the proceedings in that court. "Def. R." refers to petitioner's appendix in the court of appeals.

QUESTIONS PRESENTED

1. Whether the district abused its discretion in refusing to entertain petitioner's oral motion to suppress evidence, made for the first time at the trial and after the evidence had already been admitted without objection.

2. Whether the district court properly instructed the jury on the presumption of innocence, reasonable doubt, and burden of proof.

RULE INVOLVED

Rule 41(e), F.R. Crim. P., provides in pertinent part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained * * *. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Southern District of New York on a one-count indictment charging the possession and concealment on December 15, 1960, of falsely made and counterfeit Federal Reserve notes, in violation of 18 U.S.C. 472 (Def. R., 3). On December 20, 1961, petitioner was sentenced to imprisonment for five years (Def. R., 4; Pet. App. 30). The conviction

was affirmed by the court of appeals (Gov. R., 132–138; Pet. App. 23–29).

The pertinent facts may be summarized as follows:

1. In the early evening of December 15, 1960, two New York City detectives entered a tavern in Manhattan and brought petitioner outside (Gov. R., 28–30, 34–35, 37). Petitioner was then arrested by a third detective (Gov. R., 35, 44, 47, 50).[2] During a search of petitioner, the detectives found a large roll of twenty-dollar bills (Def. R., 16–17, 19; Gov. R., 28–29). Petitioner was taken to a nearby police station. While at the precinct station, one of the detectives noticed that the serial numbers on the individual bills were identical (Gov. R., 31, 42–43). When petitioner was asked where he had obtained the bills, he replied that he purchased them for three hundred dollars from a man named "John" (Gov. R., 31–32). The face value of the counterfeit twenty-dollar bills in the roll was between $1500 and $1600 (Gov. R., 3–4, 7, 28–29, 36–37).

Petitioner was later interviewed by a Secret Service agent. The agent told petitioner that he had a right to counsel and that he was not required to make any statement (Gov. R., 15). Petitioner said that he met a "Johnny" earlier that evening and that "Johnny" asked petitioner if he was interested in purchasing some "counterfeit money" (Gov. R., 3). Thereafter, petitioner gave three hundred dollars to "Johnny"

[2] There is nothing in the record to indicate the basis for petitioner's arrest. Petitioner was not arrested on a counterfeit charge, and the detectives did not realize until after they arrived at the precinct station that the bills taken from petitioner were counterfeit (Gov. R., 31, 42–43; 103; see Def. R., 19).

for eighty-two counterfeit twenty-dollar Federal Reserve notes (Gov. R., 3–4, 7, 21–22). Petitioner told the agent that he planned to "either sell them [the counterfeit notes] in bulk or pass them individually at a profit" (Gov. R., 4).

2. At the trial, petitioner testified that he sold three or four diamond rings to "Johnny," but did not know that the money he received was counterfeit (Gov. R., 57–58, 69–70, 78, 87–88). He said that he did not count the money which "Johnny" had given him and that he did not know "Johnny's" last name or where he lived (Gov. R., 72, 78). Petitioner said that, in order to avoid implicating a girl, he agreed to "go along" with the detectives (Gov. R., 64, 67, 82–83).

3. In its instructions to the jury, the court charged that petitioner was presumed innocent of the charges against him, and that the government bore the burden of proving guilt beyond a reasonable doubt (Def. R., 7, 9). The court further charged (Def. R., 10–11):

> And now, a word about the burden of proof, and this is always important in a criminal case. I told you the defendant is presumed to be innocent. The fact that he has been accused by a grand jury does not destroy that presumption. The burden of proof, in the sense of the responsibility of persuading you ladies and gentlemen, rests upon the government. The quantum or the measure of proof necessary before you lawfully can find the defendant guilty is referred to as proof beyond a reasonable doubt.
>
> Now, by a reasonable doubt I do not mean a positive certainty. Proof beyond a conceivable doubt cannot be reached in the world of actual-

> ity, and neither is a reasonable doubt a decision arbitrarily reached because a juror has a reluctance to perform an unpleasant task. Nor is it a disbelief that we have based upon the natural sympathy that we are supposed to have for one another.
>
> Reasonable doubt most nearly signifies one which the average person of ordinary prudence and intelligence has after weighing all the evidence carefully.
>
> And by weighing I do not mean balancing according to the greater volume of testimony, or the number of witnesses, or exhibits, but rather a determination based upon the convincing force of the witnesses' testimony.
>
> You are to be governed by quality and not necessarily by the quantity of the proof.

Petitioner objected to the foregoing instructions on the ground that the court made no mention of the fact that, if there was reasonable doubt in the minds of the jurors, they had the right and duty to acquit the defendant (Def. R., 12). The objection was overruled on the ground that the point had been covered in the instructions (Def. R., 12).

After the jury had retired to deliberate upon the case, the court received a note from the jury which read: "There is a question as to whether we can recommend lenieney" (Def. R., 13). The jury was then recalled into the court room. The trial judge answered the request as follows (Def. R., 13–14):

> I suppose by that you mean whether in returning your verdict you can recommend leniency. The answer is that if you arrive at a verdict of guilty you can recommend anything

you want, but I must tell you in the same breath that it has no weight with me. If the man is guilty, on me alone, on my conscience, is the question of sentence, but that doesn't prevent you from recommending anything you want. But I want it perfectly understood that if your verdict is that the man is guilty what punishment he should get is my problem, not yours at all.

ARGUMENT

1. Petitioner was arrested on December 15, 1960, the indictment was returned on September 15, 1961, petitioner pleaded not guilty on September 26, 1961, and his trial commenced on December 18, 1961. In that one-year period, petitioner made no motion to suppress the counterfeit bills taken from his person at the time of his arrest.

At the trial, the counterfeit bills were sought to be introduced in evidence through the Secret Service agent who had interviewed petitioner (Gov. R., 4). Petitioner's counsel was permitted to examine the agent on *voir dire* (Gov. R., 7–10). At the conclusion of the *voir dire*, the notes were received in evidence and petitioner's counsel specifically stated that he had no objection (Gov. R., 10). Counsel soon thereafter withdrew his consent and made an oral motion to suppress the evidence stating that there should be discussion of the cases "pertinent to the arrest of 'this defendant'" (Gov. R., 11). The motion was denied (Gov. R., 12). The motion was renewed and again denied after the New York City detective who arrested petitioner had testified for the government and been

cross-examined (Gov. R., 53–55). The motion was again renewed as part of the motion to dismiss at the close of the whole case, the court treating the motion as one "to dismiss because of the illegal search" (Gov. R., 109). The judge reserved decision on that motion to dismiss and subsequently denied it (Def. R., 2).

We submit that the motion to suppress was properly denied. Petitioner made no motion before trial, and did not even raise his objection at the trial until after the counterfeit bills had been introduced in evidence, specifically without objection. Rule 41(e), F.R. Crim. P., *supra*, p. 2, provides that a motion to suppress evidence "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Petitioner offered no explanation for his failure to file the motion before trial, much less a statement that "the defendant was not aware of the grounds for the motion." While this Court in its recent opinion in *Di Bella* v. *United States*, 369 U.S. 121, has indicated that the final ruling on a motion to suppress may sometimes be deferred until the criminal trial, this does not weaken the requirement of Rule 41(e) that notice of the claim should be given before trial by a motion to suppress, unless good reason for failure to file has been shown.

This case is a good illustration of why a motion to suppress should be filed before trial. The government in its brief in the court of appeals stated that it could have shown that the state officers did have probable

cause for the arrest of petitioner. Petitioner established on cross-examination of the New York detective who made the arrest that there was no arrest warrant but he did not ask the basis for the arrest (Gov. R., 34–37). In view of the fact that the counterfeit bills had already been accepted by the trial judge, the government did not undertake to develop the circumstances of the state arrest (Gov. R., 102–103). Petitioner notes that the detective who testified at the trial did not then know the names of the two other officers who went into the bar (Gov. R., 50–52). But this merely proves the desirability of a timely motion so that matters of this kind can be investigated.

The trial court was not required by Rule 41(e) to entertain petitioner's belated motion to suppress. This is particularly true since petitioner's motion came during the trial itself. A trial court is certainly not required to allow a digression from questions relating to guilt or innocence in order to conduct a hearing on a motion to suppress. We submit that in these circumstances, where a motion threatens to interfere with the conduct of the trial, the trial court has considerable discretion whether to entertain it. Here, the district court properly exercised its discretion when it refused to entertain petitioner's motion since petitioner offered no excuse of any kind for his failure to raise the issue before trial. See *Segurola* v. *United States*, 275 U.S. 106, 111–112; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2); *United States* v. *Rosen*, 293 F. 2d 938, 941 (C.A. 5); *United States* v. *Chieppa*, 241 F. 2d 635, 638 (C.A. 2), certiorari denied *sub nom. Iricola* v. *United States*,

353 U.S. 973. See also *Jones v. United States*, 362 U.S. 257, 264.

2. Petitioner contends (Pet. 12–14) that the supplemental instructions, given in response to the note from the jury, together with the court's original charge on presumption of innocence, burden of proof, and reasonable doubt, "compelled" the jury verdict of guilty. As shown by the Statement, *supra*, the court adequately charged the jury that petitioner was presumed to be innocent of the charges and that the government bore the burden of proving the charges beyond a reasonable doubt. The court defined a reasonable doubt as "one which the average person of ordinary prudence and intelligence has after weighing all the evidence carefully" (Def. R., 11). The charge, taken as a whole, was correct and did not coerce a guilty verdict. Likewise, the court's supplementary instruction that the question of punishment was for the court, rather than for the jury, was proper. As the court below said (Gov. R., 138; Pet. App. 29), "This made it quite clear to any juror inclined to compromise that the verdict was not to be adulterated by considerations extraneous to the jurors' function."

There is likewise no merit in petitioner's contention (Pet. 8–12) that the instructions to the jury were erroneous because the judge did not charge that the jury should acquit petitioner if they entertained a reasonable doubt as to his guilt. As noted, the court repeatedly instructed the jury that the government bore the burden of proving guilt beyond a reasonable doubt—a term which it explicitly defined. Petitioner, however, claims that he was entitled to an instruction

that the jury must acquit if the government did not prove petitioner guilty beyond a reasonable doubt. This instruction would have added nothing to the charge which was given. Surely, the jury could not have failed to understand that unless the government bore its burden of proof beyond a reasonable doubt, they must acquit petitioner. Even assuming that petitioner's requested instruction would have improved the trial court's charge there would have been no significant difference. As the court below properly held, the trial court's failure to give petitioner's proposed notification did not constitute prejudicial error. See Rule 52, F.R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 887

THOMAS DI DONATO,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Thomas Di Donato respectfully shows to this Honorable Court the following:

Argument

In the footnote on page 3 of the Government's brief the Prosecutor conceded there is nothing in the record to indicate the basis for Petitioner's arrest. The Prosecutor further conceded that the Petitioner was not arrested on the counterfeit charge and that the detectives did not realize until after they arrived at the precinct station that the

bills taken from Petitioner were counterfeit nor was any reason advanced why the arrest was made clearly shows the arrest was illegal further substantiated by the lack of a warrant of arrest and a search warrant.

The Government thereby conceded there was no probable cause for the arrest and the record further demonstrates the same clearly and without question (85, 86, 87) that probable cause did not exist for the arrest of the Petitioner and since there was no arrest warrant or a search warrant, the evidence so seized is illegal. In *Di Bella* v. *United States*; at 369 U. S. 121, the Court sets forth clearly that the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light and cited *In re Milburn*, 77 F. 2d 310 (1935), and *Grout* v. *United States*, 291 F. 2d 727 (1961). In the case at bar the two New York City detectives who brought Di Donato out of the bar at 50th Street and searched him remained unknown even at the date of the trial wherein could they have been known at the time any motion to suppress was to have been made prior to trial.

A search which is "unreasonable" for want of probable cause cannot be made reasonable by what the search uncovers. In law, it is good or bad when it starts and does not change character from its success. It is not made reasonable by what it brings to light (*Byars* v. *United States*, 273 U. S. 28; *Dire* v. *United States*, 331 U. S. 581; *Johnson* v. *United States*, 333 U. S. 10; *McDonald* v. *United States*, 335 U. S. 451; *People* v. *De Vasto*, 198 App. Div. 620. Perhaps there may be observable in the State decisions a tendency to be less exacting when the search uncovers evidence of a serious crime but the law recognizes no such standard. For by such a standard every unreasonable search and seizure would be validated if the police find evidence of a serious crime. Such a result can hardly be to discourage police violation of the constitutional protection.

The determination of probable cause must be based solely on facts and circumstances known to the arresting officer *before* the arrest or in case of a crime committed in his presence; contemporaneously with the arrest.

In the case at bar no words could validate the arrest. It was illegal at the start.

The crux of the matter is that no probable cause existed for the arrest and the Government's case rises or falls on the proof submitted as to why the arrest was made or what the probable cause of the arrest was! No proof was offered by the Government and is so conceded.

At the trial the main witness for the Prosecution, Martino, a detective of the City of New York proved to the Trial Court that there was no probable cause which compels a Court in the upholding of the law to dismiss the indictment. If Martino had not proved there was no probable cause then of course the Petitioner's application for a Writ of Certiorari would be without merit. Rule 41(e) or no rule, the simple fact remains that there was no probable cause for the arrest and accordingly the indictment must be dismissed and should be in the upholding of the law. Throughout the trial defense counsel made repeated motions to exclude the evidence, the counterfeit bills, based on *Mapp* v. *Ohio*, 367 U. S. 645.

Even absent the motion to suppress would not the search be illegal and the *Di Re* v. *United States*, 332 U. S. 581, be in point respecting the search of a person without probable cause in violation of the 4th amendment. The main brief for the defendant-appellant supports this contention.

The Government in its brief in opposition to the granting of the Writ states on page 9 in the last paragraph "as noted the Court repeatedly instructed the jury that the Government bore the burden of proving guilt beyond a reasonable doubt"—a term which is explicitly defined.

This is not the fact and the true fact is that the District Court lightly skimmed over the question of reasonable doubt and avoided a clear-cut definition and explanation of what reasonable doubt is. The Circuit Court for the Second Circuit states in its opinion "However, when an objection is made, the trial judge ought to utilize the opportunity provided to correct oversight and to clarify the law for the jury. This is especially important in criminal cases in which the liberty of the defendant may depend upon every word the judge may say,—or fail to say. For a judge must "be a light to jurors to open their eyes . . . ."

The entire legal profession is in accord with such a statement, however, the Circuit Court of Appeals for the Second Circuit refused to follow the *Williams* case for the reason that this case at bar was simple and because of the harmless error doctrine. The District Court Judge however, felt and did express that the legal points were complex, and certainly the failure to explain the course that a juror or jury must take if it believes that there is a reasonable doubt is not harmless error if it is ignored and wantonly disregarded.

In no part of the charge (Deft's. R. 9A to 14A, inclusive) was there a single utterance by the Court that the jury must return a verdict of not guilty if it believes from the evidence that the defendant is innocent or that the Government failed to prove the elements of the crime beyond a reasonable doubt. In a case directly in point the Court stated in *Williams* v. *United States*, 131 F. 2 21, that "In no part of the charge was the jury even told that it could return a verdict of not guilty. That is error. But more than a mere statement that defendant can be acquitted is necessary. The jury must be told at least once in some unequivocal language that if it believes from the evidence that defendant is innocent or if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable

doubt it must return a verdict of not guilty." (See also *McKenzie* v. *United States*, 126 F. 2d 538; *United States* v. *Searcey*, 26 F. 435.) This was not done in the case at bar (Deft's. R. 9A to 16A, inclusive).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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Attorney for Defendant-Appellant.